

Pacific Grain Products, Inc.¹ and Cannery Workers and Warehousemen Local 857, International Brotherhood of Teamsters, AFL-CIO, Petitioner. Case 20-RC-16759

November 30, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

The National Labor Relations Board, by a three-member panel, has considered objections to an election held November 22, 1991, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 60 for and 35 against the Petitioner, with 1 void and 6 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief, and has adopted the Regional Director's findings and recommendations² as modified below.³

1. The Employer excepts to the Regional Director's finding that the Board agent's failure to post signs designating the polling area did not invalidate the election because it was evident from the 95-percent turnout that the employees were adequately informed of the location of the polling place. The Employer contends that the Regional Director missed the point of its objection, which is that the Board agent's failure to post signs resulted in management personnel and one non-voting employee unknowingly wandering into the area. For the following reasons, we find no merit in this contention.

¹ Subsequent to the election, the Employer changed its name to Pacific Grain Products, Inc.

² In the absence of exceptions, we adopt pro forma the Regional Director's recommendations to overrule Objections 1-2, 5-10, 20, 23, 26-27, 29, 31-32, and 37 and his recommendation to send Objections 28 and 33-34 to hearing.

In addition to the three objections set for hearing by the Regional Director, Member Oviatt would also require a hearing on those portions of Objections 22, 25, and 36 dealing with the alleged discrepancy between the affidavit of employee Guillermo Deniz stating that he did not vote in the election, and the evidence that his name was marked as having voted. In Member Oviatt's view, these objections raise issues concerning the integrity of the election which can best be resolved by a hearing.

³ We find that the Board agent erred by ruling a ballot void that was marked "no" in both the "Yes" and "No" boxes. The Employer correctly maintains that such a ballot clearly indicates the voter's intent to cast a vote against the Petitioner. *Harry Lunstead Designs*, 265 NLRB 799 (1983); *NLRB v. Connecticut Foundry Co.*, 688 F.2d 871 (2d Cir. 1982). However, the error was harmless. There is no evidence that the voiding of the ballot compromised the integrity of the election process. Furthermore, even if the void ballot were counted as a vote against the Petitioner, a revised tally would show 60 votes for, and 36 against, the Petitioner. We therefore adopt the Regional Director's recommendation to overrule the Employer's Objection 11.

Assuming that the absence of signs resulted in non-voters' entering the polling area, the Employer's allegations indicate that, at most, nonvoters mistakenly entered the area only three times during the election, and then only briefly. One nonvoting employee walked through the polling area without stopping and management personnel entered the area twice, but left after being intercepted and admonished by the Board agent to leave.⁴ The standard for determining whether conduct is objectionable is whether it has a reasonable tendency to interfere with the employees' exercise of their free choice, thereby affecting the outcome of the election. *NLRB v. Gulf States Cannerys*, 585 F.2d 757, 759 (5th Cir. 1978), on remand 242 NLRB 1326 (1979), enf'd. 634 F.2d 215 (5th Cir. 1981). We find that the Employer has not shown that the nonvoters' brief presence in the polling area had a reasonable tendency to interfere with the employees' exercise of their free choice. Accordingly, we do not find any merit in the Employer's argument that the Board

⁴ The Regional Director rejected the Employer's argument that the interaction between the Board agent and management personnel was so heated that the election results must be set aside. The Regional Director found that the Board agent merely told the management personnel that supervisors should not come into the voting area during the election. We note that the Employer's brief in support of its exceptions repeatedly states that the Board agent "raised his voice" and "shouted" during each of his encounters with management personnel. However, none of the affidavits submitted by the Employer states that the Board agent "shouted," and in fact, four of the five statements by the Employer's witnesses simply state that the Board agent, in an *angry* tone, requested that management personnel leave and/or stay out of the election area. Only one of the affidavits avers that the Board agent "raised his voice" and "practically shouted" during one of the encounters. Another Employer witness to the very same incident did not state that the Board agent raised his voice or shouted. However, assuming arguendo that the Board agent spoke to the management personnel in a loud and perhaps angry voice, that would have occurred only because he was trying to maintain the integrity of the election process by getting them to leave the polling place as soon as possible so as to preclude their presence from being used as a ground for an objection. Accordingly, contrary to the contention of the Employer, we conclude that the alleged conduct did not show bias and was not otherwise objectionable.

Contrary to his colleagues, Member Oviatt would send to hearing the Employer's objections alleging that the heated interactions between the Board agent and management personnel reflected bias on the part of the Board agent requiring that the election be set aside. In Member Oviatt's view, the Employer has presented sufficient evidence to raise factual issues as to the extent of the alleged altercations between the Board agent and management personnel. See *Hudson Aviation Services*, 288 NLRB 870 (1988) (verbal altercation between Board agent and management personnel in presence of employees who had already voted was objectionable, as proof of effect on voters is not required to set aside election on the basis of Board agent bias); *Athbro Precision Engineering Corp.*, 166 NLRB 966 (1974) (commission of an act by a Board agent which would tend to destroy confidence in the Board's election process provided sufficient basis for setting aside the election, even where conduct was observed by only one eligible voter who had already voted).

agent's failure to post signs designating the polling area constituted, or resulted in, objectionable conduct.⁵

The Employer also excepts to the Regional Director's overruling its objection based on the Board agent's action after a union observer inquired as to whether two named employees had been informed of the election. On hearing the inquiry, the Board agent, accompanied by an observer from each side, sought out a releasing observer near the personnel office and inquired as to whether the two employees had been so informed. The Employer contends that this action demonstrated a bias on the part of the Board agent because there were other employees eligible to vote who worked at the same location as the two in question and the Board agent did not extend his inquiry to them. We find no merit in the Employer's contention because the Employer has not submitted evidence, or even alleged, that the Board agent was aware that other employees were working at the same location or that the Board agent was requested to inquire about other employees and refused to do so. Therefore, we do not find that the Board agent's inquiry did, or appeared to, reflect a bias toward the Union.⁶

2. The Employer excepts to the Regional Director's finding that Maria Alvarez, a union observer, did not engage in electioneering when she spoke to an employee who sought to vote, but whose name was not on the eligibility list, and encouraged the employee to explain to the Board agent why she wanted to vote. After the Board agent allowed her to cast a challenged ballot, Alvarez gave the employee a "thumbs up" sign and said, "Alright, see I told you he would let you vote." There is no evidence that any other voters witnessed this incident. We agree with the Regional Director that the Employer's objections that are based on this incident should be overruled, but we rely on different grounds. We overrule the objections because the

⁵ The Employer also argues that the NLRB Casehandling Manual (Part Two) Representation Proceedings requires the posting of "Voting Area" signs. We note that the Manual's guidelines are not binding procedural rules but instead are intended to provide operational guidance in the handling of an election. NLRB Casehandling Manual (Part Two) Representation Proceeding, Introduction and Purpose. Although we have invalidated elections because of a Board agent's failure to follow the Manual's guidelines, we do not invalidate elections based on minor deviations from the guidelines, that are not shown to raise a "reasonable doubt as to the fairness and validity of the election." *Kirsch Drapery Hardware*, 299 NLRB 363, 364 (1990), quoting *Polymers, Inc.*, 174 NLRB 282 (1969), enf'd. 414 F.2d 999 (2d Cir. 1969).

⁶ In addition to overruling the Employer's objections that are based on the Board agent's individual actions, we find no merit in the Employer's contention that, considered cumulatively, the Board agent's actions contributed to an "intolerable atmosphere of confusion, distraction, dereliction of duty . . . preventing the election from occurring under laboratory conditions." Instead, we find that, even considered cumulatively, the Board agent's actions did not have a reasonable tendency to influence the outcome of the election or interfere with the employees' exercise of their free choice.

only affected employee's ballot would not affect the outcome of the election.⁷

Finally, the Regional Director's report does not address the Employer's allegation that Union Observer Alvarez threatened another employee approximately 8 to 10 days before the election. The Employer alleges that Alvarez telephoned Adela Figueroa at home and told Figueroa that if Figueroa did not attend a union meeting, she would be fired. When Figueroa stated that she could not attend the meeting, Alvarez allegedly asked Figueroa for her social security number. The Employer did not allege that Alvarez held a supervisory position, that Alvarez had any control over Figueroa's work or job security, or that Alvarez was a union agent. Even assuming arguendo, that Alvarez was a union agent because of her status as election observer, we find that the alleged threat did not warrant setting aside the election.⁸ Under the standard used in evaluating conduct of parties, conduct is objectionable if it would reasonably tend to interfere with the employees' free and uncoerced choice in the election. *Baja's Place*, 268 NLRB 868 (1984). Here, the Employer has not alleged nor offered evidence that Alvarez or the Union had any control over Figueroa's job security. Thus, Figueroa could not reasonably believe that Alvarez or the Union had the ability to carry out the alleged threat. See *Bonanza Aluminum Corp.*, 300 NLRB 584 (1990). Nor did the Employer submit evidence that the alleged threat was widely disseminated among the Employer's employees. Under such circumstances, we find that the alleged threat made by Alvarez to Figueroa would not reasonably tend to interfere with the employees' free and uncoerced choice in the election.

ORDER

It is ordered that the Employer's Objections 1-10, 12-27, 29-32, and 35-37 are overruled.

IT IS FURTHER ORDERED that a hearing be held before a duly designated hearing officer for the purpose of receiving evidence to resolve the issues raised with respect to the Employer's Objections 28 and 33-34.

IT IS FURTHER ORDERED that the hearing officer designated for the purpose of conducting the hearing shall prepare, issue, and serve on the parties a report containing resolutions of the credibility of the witnesses, findings of fact, and recommendations to the Board as to the disposition of the objections. Within 14 days from the date of issuance of the report, either party may file exceptions to the report with the Board in

⁷ Member Raudabaugh would affirm the Regional Director based on his stated grounds and on the grounds set forth above.

⁸ In Member Raudabaugh's view, Alvarez' service as a union observer at the election is insufficient, standing alone, to establish an agency relationship between her and the Union with respect to her conduct occurring prior to the election. See, e.g., *Advance Products Corp.*, 304 NLRB 436 (1991).

Washington, D.C. Immediately on the filing of exceptions, the party filing them shall serve a copy on the other party, and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the hearing officer.

IT IS FURTHER ORDERED that the above-entitled matter is remanded to the Regional Director for Region 20 for the purpose of taking action consistent with this Order.